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No. 05-1157

IN THE

Supreme Court of the United States

CREDIT SUISSE FIRST BOSTON LTD., *et al.*,

Petitioners,

v.

GLEN BILLING, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BILLING PLAINTIFFS' SUPPLEMENTAL BRIEF

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Assuming *arguendo* that Petitioners' Supplemental Brief ("Pet. Supp.") properly responds to supplemental authority under this Court's Rule 15.8,[1] such submission vividly illustrates further reasons why certiorari should be denied.

Prefatorily, the Commentary is not a statement by the Securities and Exchange Commission ("SEC"). Indeed, the Commentary offers as its main reason for certiorari an argument that the SEC has expressly recognized was **not** at issue in the briefing and decisions below. *See* I *infra*.

I. THE COMMENTARY'S MAIN ARGUMENT FOR IMPLIED IMMUNITY WAS NEITHER RAISED NOR CONSIDERED IN THE COURT BELOW

Petitioners and the Commentary offer a new argument for implied immunity that was neither raised by Petitioners nor considered by any of the Courts below: the remedies provided by the federal securities laws to investors are supposedly the exclusive remedies available to investors or are otherwise indicative of a Congressional intent to immunize conduct from antitrust prosecution. *E.g.*, Pet. Supp. at p. 1 (quoting the Commentary's statement that the antitrust claim here "evades the limitations that Congress adopted . . . 'to rein in terribly costly frivolous class action lawsuits brought under the federal securities laws'").

However, in responding to the request of one of the Courts below for its positions, the SEC itself expressly recognized that the exclusive remedy argument for implied immunity had not been raised and was not before the Court.

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1. The "commentary" by Paul Atkins, *A Serious Threat To Our Capital Markets*, Wall Street Journal, June 10, 2006, at A 12 ("Commentary"), is clearly neither a Court decision nor new legislation, however, it may arguably be an "intervening matter".

See Memorandum Amicus Curiae of the Securities Exchange Commission, Submitted at the Request of the [District] Court, p. 27, n. 8 ("Defendants do not challenge this aspect of *Strobl*, and consequently, the Commission does not here express any views on the correctness of the single remedy rule. *Cf. Olmstead v. Pruco Life Insurance Company of New Jersey*, 283 F.3d 429, 435 n. 5 (2d Cir. 2002) (court will ordinarily not consider an argument raised only by an amicus.)"). Because this ground for implied antitrust immunity was neither raised nor considered in the Courts below (*e.g.*, Decision *passim*), it clearly is an improper ground for certiorari. *See Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 738 (1998) (refusing to consider an argument raised for the first time in the Supreme Court).

II. THE ANTITRUST CLAIMS HERE ARE NOT "NEW" AND CONGRESS EXPRESSLY PRESERVED "RIGHTS AND REMEDIES" SUCH AS THESE

One likely reason why Petitioners did not raise the exclusive remedy argument in support of their implied immunity motion below is revealed by the errors in the Commentary's following ahistorical statement: this "Court needs to resolve the issue of antitrust immunity before the plaintiffs' bar can wield its **new** weapon to strike a blow to the American capital markets". Pet. Supp. p. 3. (emphasis supplied).

Far from constituting a "new" weapon against capital markets, the antitrust claim here is merely a continuation of more than one hundred years of previous restraint of trade and antitrust prosecutions promoting the health of "American capital markets". *See* Billing Plaintiffs' Brief in Opposition at p. 24 (collecting citations to common law restraint of trade and Sherman Antitrust Act prosecutions of agreements to

inflate stock prices, underwriters' agreements to inflate their charges, and other collusive agreements by underwriters).[2]

These highly-publicized antitrust prosecutions have resulted in billions of dollars in savings to investors and furthered the enlightened self-interest of Petitioners themselves. *Id.* at pp. 26-28 (collecting statistics and authorities).

In enacting and amending the federal securities laws for seventy-plus years, Congress has (with one exception for certified class actions arising under state law) retained one constant:

> the rights and remedies provided . . . shall be in addition to any and all other rights and remedies that may exist at law or in equity.

Securities Act of 1933 Section 16 (a), 15 U.S.C. § 77p(a); *see also* Securities Exchange Act of 1934 Section 78(a), 15 U.S.C. § 78bb(a)(similar savings clause).

Congressional intent to preserve investors' rights *per force* includes investors' well-established, highly-publicized rights and remedies under the federal antitrust laws. Thus, Congress' savings clause contraindicates any implied Congressional intent to extirpate such rights or remedies.

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2. *See, e.g., In Re Nasdaq Marketmakers Antitrust Litigation*, 187 FRD 466 (S.D.N.Y. 1998); *United States v. Alex Brown & Sons, Inc.*, 963 F. Supp. 235 (S.D.N.Y. 1997); *United States v. Steinhardt Management Co. & Caxton Corp.*, 1995 WL 10627 (DOJ Notice, January 13, 1995); *Three Crown Ltd. Partnership v. Solomon Brothers, Inc.*, 1995 WL 422467 (S.D.N.Y. July 14, 1995); *United States v. Morgan*, 118 F. Supp. 621 (S.D.N.Y. 1953); *Livermore v. Bushnell*, 12 N.Y. Sup. Ct. (5 Hun) 285 (1885). *See also* Appendix 206A fn 6 (collecting various previous instances in which parallel prosecutions of the federal antirust laws and the federal securities laws have been made in response to the same conduct).

In sum, in the forgoing circumstances, the Commentary's main reason for granting certiorari (a) was not raised below, (b) was recognized by the SEC, in its amicus brief, not to have been raised below, (c) provides no basis to challenge the Decision, and (d) further illustrates that certiorari is inappropriate in this case.

III. THE PETITIONERS' MISCHARACTERIZATION OF THE ANTITRUST CLAIMS HERE ILLUSTRATES THE PAST, PRESENT AND FUTURE HARMONY OF THE ANTITRUST AND SECURITIES LAWS WITH RESPECT TO THE CHALLENGED CONDUCT

Because the "epic" conspiracy challenged here is statutorily prohibited by both the antitrust and securities laws, this case presents a situation of conceded past, present and foreseeable future harmony between the antitrust and regulatory statutes. Billing Plaintiffs' Brief in Opposition at pp. 2-3, 11-16. Such harmony cannot be misconstrued as the plain repugnancy required for implied immunity. *Id.* pp. 2-3.

However, the Commentary and the Petitioners mischaracterize the claim here as an attack on the underwriters' ability to agree to set the IPO price. Pet. Supp. p.2. But such activity is not challenged by the claim here (and is permitted by the federal securities laws). Billing Plaintiffs' Brief in Opposition at pp. 11-14.

Instead, plaintiffs allege that defendants conspired to inflate their charges and inflate **aftermarket prices above** the IPO price. *Id.* Such collusive conduct clearly violates the federal antitrust laws. *Id.* fn 8, pp. 12-13.

Moreover, such conduct has always been statutorily prohibited by the "heart" of the Securities Exchange Act, Section 9(a)(2), 15 U.S.C. Section 78i(a)(2) (prohibiting joint action "to raise" prices); *see* Billing Plaintiffs' Brief in Opposition at pp. 15-16 (quoting SEC interpretations of Section 9(a)2 as the "heart" of the Securities Exchange Act); App. p. 12a (Decision notes that Section 9(a)(2) was originally enacted precisely in order to prohibit "pools" of brokers and others from combining to inflate aftermarket stock prices).

Once the Petitioners' and the Commentary's mischaracterization of plaintiffs' claim is corrected, the absence of any grounds for certiorari is again vividly illustrated.

IV. IGNORING THE ABSENCE OF ANY NEW ANTITRUST CLAIMS AGAINST UNDERWRITERS AND THE SECOND CIRCUIT'S REPEATED DECISIONS GRANTING ANTITRUST IMMUNITY TO UNDERWRITERS, THE COMMENTARY ERRONEOUSLY PREDICTS THAT THE DECISION WILL LEAD TO NEW ANTITRUST CLAIMS AGAINST UNDERWRITERS

In order to manufacture a non-existent urgency for certiorari, Petitioners ignore important Second Circuit precedent and the fact that four-fifths of Petitioners' pending motion to dismiss has not yet been decided.

Freed from such constraints, Petitioners and the Commentary predict that "stability in our capital markets" will be threatened by numerous new antitrust claims if certiorari is not granted. Pet. Supp. p. 2.

This prediction is belied by the fact that the Second Circuit Court of Appeals has **granted** implied antitrust immunity to these same underwriters in connection with syndicate underwritings[3] and in the context of collusive exchange action even where the SEC and DOJ had successfully concluded parallel prosecutions.[4]

The truth is that each case turns on its own facts. The critical factual difference between this case and the foregoing Second Circuit decisions granting implied antirust immunity is as follows. Here, the federal antitrust laws and the federal securities laws both have prohibited, since their inception, the challenged conduct. Billing Plaintiffs' Brief in Opposition at pp. 13-18. In contrast, in *Friedman* and *Exchange Options* the challenged conduct, at one time or another, had been permitted under the federal securities laws.

This key factual difference also distinguishes this case from this Court's prior rulings granting antitrust immunity. Billing Plaintiffs' Brief in Opposition at pp. 16-17 (collecting cases). Thus, after the Decision, no Judge of the Second Circuit Court of Appeals voted for re-hearing *en banc* and Respondents were not even asked to file a brief. Appendix at 123a.

Contrary to the Commentary's prediction, what will happen in the future is as follows. Generally, on a case by case basis, courts will examine the facts, as they always have and as the Decision painstakingly did, to see whether this Court's clearly articulated immunity standard has been satisfied. Moreover, during the five-plus years since this case

3. *Friedman v. Solomon Smith Barney, Inc.*, 313 F.3d 796 (2d Cir. 2002), *cert. denied*, 540 U.S. 822 (2003) ("*Friedman*").

4. *In Re Stock Exchange Options Trading Antitrust Litigation*, 317 F. 3d 134 (2d Cir. 2003).

was filed, no new antitrust cases have been brought against underwriters.

In this specific case, the remaining four-fifths of the motion to dismiss will be considered under the remand instructions of the Decision. This includes instructions based on the Court's decision in *Verizon Communication, Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398 (2004) (denying implied antitrust immunity but dismissing for failure to state a claim - - - a ground for the pending motion to dismiss the claim here that has not yet been considered by any court below).

Thus, correcting the Petitioners' painfully incorrect prediction once again illustrates why certiorari should be denied here.

SUMMARY

When the Commentary's errors are corrected, it is clear that what Petitioners are really challenging here is not any supposed conflict between the Decision and this Court's prior implied antitrust immunity decisions.

Rather, Petitioners are asking this Court to give them what Congress, for decades, has wisely refused to provide: blanket immunity from antitrust prosecutions. Petitioners' latest grounds for this are an exclusive remedy argument that was neither briefed nor considered below and is contrary to Congress' express savings clauses and a century of antitrust prosecution.

For this further reason and the reasons previously set forth by the Billing plaintiffs, the Petition's asserted grounds for certiorari are non-existent and the Petition should be denied.

Respectfully submitted,

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